

LOUISIANA PUBLIC SERVICE COMMISSION

GENERAL ORDER

LOUISIANA PUBLIC SERVICE COMMISSION EX PARTE

DOCKET NO. R-32587 - To review and formulate possible changes to General Order dated November 2, 1987 and General Order dated March 18, 1994, pertaining to the requirements for completing a sale, transfer, or change of control for Common and Contract Carriers regulated by the Louisiana Public Service Commission

*(Amends and Supersedes General Order dated November 2, 1987
and General Order dated March 18, 1994 solely for Common and Contract Carriers Regulated
by the Louisiana Public Service Commission)*

(Decided at the Open Session dated January 30, 2013)

Purpose

The Louisiana Public Service Commission ("LPSC" or "Commission") initiated this Rulemaking to consider amendments to General Order dated November 2, 1987 and General Order dated March 18, 1994, pertaining to the requirements that Common and Contract Motor Carriers and Common Carriers as described by La. R.S. 45:251-253 ("Common and Contract Carriers") must satisfy in order to complete a sale, transfer, assignment, lease, or any other transaction that disposes of the assets of the Common or Contract Carrier (hereinafter "sale and/or transfer"), before the Commission. The Commission directed Staff to review the requirements that are currently in effect for a sale and/or transfer and requested that Staff formulate a more efficient and effective method for reviewing and approving a sale and/or transfer involving Common and/or Contract Carriers.

Pursuant to the directive, Staff investigated the Commission's current rules and regulations, including General Order dated November 2, 1987 and General Order dated March 18, 1994. Staff furthered reviewed the Commission's constitutional and statutory authority, including but not limited to, La. R.S. 45:166. The primary objective for the Commission and Staff in this Rulemaking was to foster greater efficiency in reviewing and approving a sale and/or transfer in the transportation industry when the parties to the transaction meet certain criteria. With this objective in mind, Staff's recommendations contained herein are designed to achieve the goals of the Commission by addressing the following:

- 1) The criteria to be reviewed when approving the sale and/or transfer involving a Common or Contract Carrier;
- 2) The requirement that a Common or Contract Carrier must receive prior approval from the Commission for a sale and/or transfer:

- 3) The percentage of assets that may be disposed of without Commission approval;
- 4) Clarifying the requirements of La. R.S. 45:166 as they apply to Common or Contract Carriers that are under voluntary suspension; and
- 5) Authorizing the Administrative Law Judge or Hearing Examiner to issue an Order approving the subject sale and/or transfer.

Jurisdiction

This Rulemaking was established pursuant to the following constitutional and legislative authority:

Article IV, Section 21 (B) of the Louisiana Constitution provides in pertinent part:

The [public service] commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.

La. R.S. 45:166 (B) provides in pertinent part:

B. No certificate or permit shall be sold, leased or transferred, nor shall such certificate or permit be used by any other than the person, firm or corporation to whom it was originally granted, unless and until it be shown by a clear preponderance and to the satisfaction of the commission that the owner thereof shall have for a period of six consecutive months, immediately prior to the lease transfer or use thereof by one other than the owner, substantially operated all rights under said certificate or permit; or that the failure to so operate was due to bankruptcy, receivership, or other legal proceedings, or to other causes beyond his or its control.

In addition to the constitutional and legislative authority contained above, this Rulemaking was initiated to amend the rules and regulations of the Commission as contained in General Order dated November 2, 1987 and General Order dated March 18, 1994 for Common and Contract Carriers.

Background/Analysis

The Commission directed Staff to review the procedures currently in effect for a sale and/or transfer by Common or Contract Carriers regulated by the Commission. The directive to review these procedures is necessary due to the realities of the transportation industry and to promote the continuation of efficient operations throughout the industry.

The Rulemaking opened by Staff focuses on improving the sale and/or transfer process in a number of areas. Initially, Staff recommends exempting all Common and Contract Carriers regulated by the Transportation Division from the requirements of the General Order dated March 18, 1994.

I. Exemption for all Common and Contract Carriers from General Order dated March 18, 1994.

Previously, the March 18, 1994 General Order applied to sales and/or transfers involving utilities and Common Carriers. The Rulemaking in this docket is designed to set requirements for sales and/or transfers for entities regulated by the Transportation Division of the Commission, specifically Common and Contract Carriers. Accordingly, as a result of this General Order, the provisions of the General Order dated March 18, 1994 will no longer apply to Common and Contract Carriers. Any and all requirements set forth in that General Order that apply to utility providers are not altered in this Rulemaking.

As a replacement for complying with the requirements of General Order dated March 18, 1994, Common and Contract Carriers will be subject to the provisions set forth in this General Order, which are discussed in greater detail below.

II. Sales and/or transfers by Carriers that hold a Certificate or Permit of Public Convenience and Necessity issued by the Commission.

Under current procedure for sales and/or transfers, any Carrier that holds a Certificate or Permit of Public Convenience and Necessity is required to prove the elements set forth in General Order dated March 18, 1994. The most notable requirements of that General Order are the eighteen (18) public interest factors. In this Rulemaking, Staff was concerned with the application of those criteria that were designed to apply to utility providers and not the transportation industry. Staff has addressed this concern in two distinct ways. First, Staff recommends that if the sale and/or transfer only implicates thirty-three percent (33%) or less of the Carrier's assets and does not include the Certificate or Permit of Public Convenience and Necessity, the Carrier shall not be required to seek Commission approval of the sale and/or transfer. Second, Staff recommends that the eighteen (18) public interest criteria from General Order dated March 18, 1994 be streamlined to ten (10) points to demonstrate that a sale and/or transfer is in the public interest. (See Attachment "A").

III. Requirement that a Carrier seek the prior approval of the Commission

Currently, a Carrier is required to seek the prior approval of the Commission when completing a sale and/or transfer. This requirement is enumerated several times throughout General Order dated March 18, 1994. However, the justification for mandating the prior approval of the Commission for utility providers does not apply to the transportation industry. The transportation industry is dynamic and competitive throughout Louisiana, and requiring a

Common or Contract Carrier to seek the prior approval of the Commission in all sales and/or transfers could put the Carrier at a competitive disadvantage. Accordingly, Staff recommends that in the event that a Carrier that holds a Certificate or Permit of Public Convenience and Necessity does not seek the approval of the Commission prior to completing a sale and/or transfer, the Carrier shall be given the opportunity to prove at a hearing before an Administrative Law Judge that there was a “good faith” basis for not seeking the prior approval of the Commission. While Staff is not defining “good faith” at this time, Staff will assess the basis for not seeking prior approval on a case specific basis and assert at the hearing whether Staff supports the arguments set forth by the Carrier.

Nothing contained in this General Order shall excuse a Carrier that holds a Certificate or Permit of Public Convenience and Necessity from seeking the approval of the Commission when the sale and/or transfer includes greater than thirty-three percent (33%) of the assets of the Carrier or contemplates the sale and/or transfer of a Certificate or Permit of Public Convenience and Necessity. Instead, Staff recommends allowing the Carrier to prove “good faith” in failing to seek prior approval. Lastly, if the Administrative Law Judge or Hearing Examiner finds that there was “good faith” in failing to seek prior approval, the Administrative Law Judge or Hearing Examiner may find that the Carrier is in compliance with the Commission’s sale and/or transfer requirements.

IV. Requirements of La. R.S. 45:166 and General Order dated November 2, 1987

La. R.S. 45:166 (B) requires that immediately prior to the transfer of a Certificate or Permit of Public Convenience and Necessity, the owner thereof shall substantially operate all rights under said certificate or permit for six (6) months. La. R.S. 45:166 (B) allows for an exception when, “the failure to so operate was due to bankruptcy, receivership, or other legal proceedings, or to other causes beyond his or its control.” Staff recommends that the Commission clarify that the requirements of La. R.S. 45:166 (B) are satisfied by a Carrier who proves by a preponderance of the evidence that the certificate was operated as required by statute and the Carrier satisfies the “good faith” provisions described above. Without said clarification, the efficient transaction of business in the transportation industry in Louisiana could be stalled by requiring a Carrier to seek the Commission’s prior approval that the certificate was operated for the required six (6) month period. The plain language of La. R.S. 45:166 (B) does not contain the

requirement of prior approval, however it is Staff's position that a clarification of the Commission's position is necessary to address any potential conflicts that may develop.

General Order dated November 2, 1987 sets forth the criteria for requesting a voluntary suspension and the requirements for a Carrier to remain in compliance with the Commission during the voluntary suspension. The General Order states, "NOTE: Voluntary suspensions do not abrogate the provisions of LRS 45:166." (See No. 7 in General Order dated November 2, 1987). However, that General Order does not address specifically sales and/or transfers. Accordingly, Commission Staff recommends clarification on this issue.

Staff's recommendation is that a Carrier under voluntary suspension for up to twelve (12) months, may provide by sworn evidence the reason(s) why the Carrier was not able to substantially operate the Certificate for six (6) months prior to the sale and/or transfer as required by La. R.S. 45:166. A voluntary suspension itself does not alleviate a Carrier from the responsibility of substantially operating under the Certificate for six (6) consecutive months prior to a sale and/or transfer. However, by providing the appropriate sworn evidence as stated herein, a Carrier may qualify under an exception from the six (6) months of substantial operation contained in La. R.S. 45:166 (B). If the Carrier can provide this evidence at a hearing, the Administrative Law Judge or Hearing Examiner may find that the provisions of La. R.S. 45:166 have been satisfied.

There are two caveats to this recommendation; first being that a Carrier must still comply with all provisions of La. R.S. 45:166 (B) for the time period before the voluntary suspension; the second caveat being that a Carrier that has been under voluntary suspension for more than twelve (12) months, may not comply with the exception in La. R.S. 45:166 (B) solely by filing sworn evidence as described herein. This last provision is designed to avoid the sale and/or transfer of dormant certificates.

V. Sale and/or transfer by Carriers that do not hold a Certificate or Permit of Public Convenience and Necessity issued by the Louisiana Public Service Commission

The sale and/or transfer procedure utilized by the Commission is designed to allow the efficient transaction of business in the transportation industry. However, there are criteria that need to be imposed upon Carriers when a Certificate or Permit of Public Convenience and Necessity is at issue in a sale and/or transfer. This is due to the fact that a transaction that contemplates a dormant certificate, or when a certificate is transferred to a Carrier who may not

be able to operate under the certificate, the market for the transportation of regulated commodities may be substantially affected. The same reasoning for the Commission's requirements in those circumstances does not apply to Carriers who are not required to hold a Certificate or Permit of Public Convenience and Necessity. Accordingly, Staff recommends that a sale and/or transfer by a Carrier that does not hold a Certificate or Permit of Public Convenience and Necessity, be reviewed at a Staff level. This procedure can be completed by the issuance of a Letter of Non-opposition if necessary. Lastly, any sale and/or transfer that does not include thirty-three percent (33%) or more of the assets of the Carrier, does not require Commission approval.

Conclusion

This General Order amends the current procedures of the Commission in approving sales and/or transfers in the transportation industry in order to promote the continuation of efficient operations in the transportation industry throughout Louisiana while fulfilling the constitutional mandates of the Commission. Current industry conditions necessitate the review by Staff and this General Order improves the process of sales and/or transfers for all Carriers regulated by the Transportation Division.

The Proposed General Order was published in the Commission's Bulletin dated November 9, 2012. The deadline for filing interventions and specific comments was December 5, 2012. A Technical Conference was held December 10, 2012. An intervention was filed on behalf of Louisiana Waste Transport Trade Organization Inc. and comments were received from Vacuum Truck Carriers of Louisiana, Inc., Stafford Transport of Louisiana, Inc., D/B/A CEI and Stranco, Inc. The comments were supportive of the proposed changes recommended by Staff in the Proposed General Order. At the Technical Conference the intervening and commenting parties provided comments for Staff to consider. As with the filed comments, the comments at the Technical Conference were supportive of the proposals made by Staff. Following the Technical Conference, Staff completed a few minor corrections to the Proposed General Order. Thereafter, on January 9, 2013, a second Proposed General Order was filed into the record of the docket and was made available to all interested parties.

The Commission considered the Proposed General Order filed into the record on January 9, 2013 at the Business and Executive Session held on January 30, 2013. The Proposed General Order considered by the Commission contained the following recommendation:

Staff's Recommendation

Consistent with the foregoing, Staff recommends that the following rules and regulations be adopted:

All Common and Contract Motor Carriers and Common Carriers as described by La. R.S. 45:251-253 (hereinafter referred to as "Common and/or Contract Carrier") shall comply with the requirements of this General Order and General Order dated November 2, 1987 to the extent that the provisions of that General Order are not affected herein. All Common and Contract Carriers are no longer required to satisfy the requirements of General Order dated March 18, 1994, in any sale, transfer, or any transaction that results in a change in the control or operation of a Common or Contract Carrier.

- I. Any sale and/or transfer by a Common or Contract Carrier that holds a Certificate or Permit of Public Convenience and Necessity issued by the Commission shall not be required to seek Commission approval if the sale and/or transfer is less than thirty-three percent (33%) of the assets of the Carrier and the sale and/or transfer does not include the Certificate or Permit of Public Convenience and Necessity.
- II. Commission Staff shall review sales and/or transfers by Common and Contract Carriers that do not hold a Certificate or Permit of Public Convenience and Necessity issued by the Commission. The Carriers subject to this Section shall not be required to seek Commission approval if the sale and/or transfer is less than thirty-three percent (33%) of the assets of the Carrier.
- III. In any sale and/or transfer by a Common or Contract Carrier that holds a Certificate or Permit of Public Convenience and Necessity that requires Commission approval, the Administrative Law Judge or Hearing Officer shall consider the ten (10) public interest criteria attached to this General Order in Attachment "A" in addition to analyzing the fitness of the purchasing Carrier.
- IV. It is hereby authorized by the Commission that in the event that a Common or Contract Carrier that holds a Certificate or Permit of Public Convenience and Necessity does not seek the prior approval of the Commission when completing a sale and/or transfer, the Carrier that continues operations after the transaction may provide evidence at a hearing, by testimony or otherwise, of "good faith" in failing to seek prior approval from the Commission.
- V. Based upon the evidence presented at an evidentiary hearing on the sale and/or transfer, Commission Staff may support the assertion of "good faith" in failing to seek the prior approval of the Commission. In the event that the Administrative Law Judge or Hearing Examiner finds that the Carrier's failure to seek the prior approval of the Commission was done in "good faith", the Administrative Law Judge or Hearing Examiner, shall find consistent with this General Order that the Carrier is excused from seeking the prior approval of the Commission as to the sale and/or transfer.
- VI. Any and all requirements contained in La. R.S. 45:166 (B) shall be satisfied by a Carrier proving by a preponderance of the evidence at an evidentiary hearing that all rights under the Certificate or Permit of Public Convenience and Necessity were substantially operated for a period of six (6) months prior to the date of the sale and/or transfer, or that the failure to so operate was due to bankruptcy, receivership, or other legal proceedings, or to other causes beyond the Carrier's control.

- A. Nothing contained herein shall affect the ability of the Carrier to prove “good faith” in failing to seek the prior approval of the Commission as detailed in Sections IV and V.
 - B. A voluntary suspension does not alleviate the Carrier from complying with La. R.S. 45:166, however a Carrier under voluntary suspension for up to twelve (12) months, may provide by sworn evidence the reason(s) why the Carrier was not able to substantially operate the Certificate for six (6) months prior to the sale and/or transfer as required by La. R.S. 45:166. If the Carrier provides sufficient evidence at the hearing to comply with one of the exceptions contained within La. R.S. 45:166 (B), the sale and/or transfer of a Certificate or Permit of Public Convenience and Necessity under voluntary suspension shall be valid.
- VII. In the event that a Common or Contract Carrier that holds a Certificate or Permit of Public Convenience and Necessity is able to meet the requirements set forth in this General Order, the Administrative Law Judge or Hearing Examiner shall approve the sale and/or transfer as requested by the Applicant.

Commission Staff further recommended that the General Order be effective immediately and the provisions contained therein shall be applicable to all applications currently pending before the Commission.

Commission Consideration

This matter was considered at the Commission’s Business and Executive Session held on January 30, 2013. On motion of Commissioner Campbell, seconded by Commissioner Holloway, and unanimously adopted, the Commission voted to accept the Staff Recommendation and adopt the Proposed General Order filed into the record on January 9, 2013.

IT IS THEREFORE ORDERED THAT:

All Common and Contract Motor Carriers and Common Carriers as described by La. R.S. 45:251-253 (hereinafter referred to as “Common or Contract Carrier”) shall comply with the requirements of this General Order and General Order dated November 2, 1987 to the extent that the provisions of that General Order are not affected herein. All Common and Contract Carriers are no longer required to satisfy the requirements of General Order dated March 18, 1994, in any sale, transfer, or any transaction that results in a change in the control or operation of a Common or Contract Carrier.

- I. **Any sale and/or transfer by a Common or Contract Carrier that holds a Certificate or Permit of Public Convenience and Necessity issued by the Commission shall not be required to seek Commission approval if the sale and/or transfer is less than thirty-three percent (33%) of the assets of the Carrier and the sale and/or transfer does not include the Certificate or Permit of Public Convenience and Necessity.**
- II. **Commission Staff shall review sales and/or transfers by Common and Contract Carriers that do not hold a Certificate or Permit of Public Convenience and Necessity issued by the Commission. The Carriers**

subject to this Section shall not be required to seek Commission approval if the sale and/or transfer is less than thirty-three percent (33%) of the assets of the Carrier.

- III. In any sale and/or transfer by a Common or Contract Carrier that holds a Certificate or Permit of Public Convenience and Necessity that requires Commission approval, the Administrative Law Judge or Hearing Officer shall consider the ten (10) public interest criteria attached to this General Order in Attachment "A" in addition to analyzing the fitness of the purchasing Carrier.
- IV. It is hereby authorized by the Commission that in the event that a Common or Contract Carrier that holds a Certificate or Permit of Public Convenience and Necessity does not seek the prior approval of the Commission when completing a sale and/or transfer, the Carrier that continues operations after the transaction may provide evidence at a hearing, by testimony or otherwise, of "good faith" in failing to seek prior approval from the Commission.
- V. Based upon the evidence presented at an evidentiary hearing on the sale and/or transfer, Commission Staff may support the assertion of "good faith" in failing to seek the prior approval of the Commission. In the event that the Administrative Law Judge or Hearing Examiner finds that the Carrier's failure to seek the prior approval of the Commission was done in "good faith", the Administrative Law Judge or Hearing Examiner, shall find consistent with this General Order that the Carrier is excused from seeking the prior approval of the Commission as to the sale and/or transfer.
- VI. Any and all requirements contained in La. R.S. 45:166 (B) shall be satisfied by a Carrier proving by a preponderance of the evidence at an evidentiary hearing that all rights under the Certificate or Permit of Public Convenience and Necessity were substantially operated for a period of six (6) months prior to the date of the sale and/or transfer, or that the failure to so operate was due to bankruptcy, receivership, or other legal proceedings, or to other causes beyond the Carrier's control.
 - A. Nothing contained herein shall affect the ability of the Carrier to prove "good faith" in failing to seek the prior approval of the Commission as detailed in Sections IV and V.
 - B. A voluntary suspension does not alleviate the Carrier from complying with La. R.S. 45:166, however a Carrier under voluntary suspension for up to twelve (12) months, may provide by sworn evidence the reason(s) why the Carrier was not able to substantially operate the Certificate for six (6) months prior to the sale and/or transfer as required by La. R.S. 45:166. If the Carrier provides sufficient evidence at the hearing to comply with one of the exceptions contained within La. R.S. 45:166 (B), the sale and/or transfer of a Certificate or Permit of Public Convenience and Necessity under voluntary suspension shall be valid.
- VII. In the event that a Common or Contract Carrier that holds a Certificate or Permit of Public Convenience and Necessity is able to meet the requirements set forth in this General Order, the Administrative Law Judge or Hearing Examiner shall approve the sale and/or transfer as requested by the Applicant.

This General Order shall be effective immediately and the provisions contained herein will be applicable to all applications currently pending before the Commission.

**BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA**

February 5, 2013

/S/ ERIC F. SKRMETTA

DISTRICT I

CHAIRMAN ERIC F. SKRMETTA

/S/ CLYDE C. HOLLOWAY

DISTRICT IV

VICE CHAIRMAN CLYDE C. HOLLOWAY

/S/ FOSTER L. CAMPBELL

DISTRICT V

COMMISSIONER FOSTER L. CAMPBELL

/S/ LAMBERT C. BOISSIERE

DISTRICT III

COMMISSIONER LAMBERT C. BOISSIERE, III



**EVE KAHAO GONZALEZ
SECRETARY**

/S/ SCOTT A. ANGELLE

DISTRICT II

COMMISSIONER SCOTT A. ANGELLE

ATTACHMENT “A”

- 1) Provide in detail why the sale and/or transfer is in the public interest.
- 2) Whether the sale and/or transfer will maintain or improve the financial condition of the resulting Common or Contract Carrier, including whether the acquiring entity has the financial ability to provide safe, reliable, and adequate service.
- 3) Whether the transfer will adversely affect competition.
- 4) Whether the transfer will maintain or improve the quality of management of the resulting Common or Contract Carrier doing business in the State.
- 5) Explain in detail the effect the transfer will have on the employees of all involved Common or Contract Carriers, including whether the transfer will be fair and reasonable to said employees.
- 6) Whether the transfer would be fair and reasonable to the majority of all affected Common or Contract Carrier shareholders.
- 7) Explain in detail whether state and local economies will be affected by the transfer, and whether the communities in the area served by the Common or Contract Carrier will suffer any adverse consequences.
- 8) Detail the history of compliance of the acquiring entity, including all principals or affiliates, with regulatory authorities in the state or any other jurisdiction.
- 9) Detail whether the acquiring entity, or resulting Common or Contract Carrier, has the ability to obtain all necessary permits from the state or other applicable jurisdictions.
- 10) Provide a clear explanation of why the Commission should, or should not, impose any additional restrictions on the transfer.